APPENDIX A

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United States Court of Appeals, Third Circuit.

UNITED STATES of America
v.
Devon E. SANDERS, Appellant

Nos. 18-2719 and 18-2994
| Argued: September 24, 2019
| (Opinion filed: November 13, 2020)

***743** On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Criminal No. 2:16-cr-00513-001), District Court Judge: Honorable Lawrence F. Stengel

Before: McKEE, AMBRO, and ROTH, Circuit Judges

OPINION[*]

[*] This disposition is not an opinion of the full Court and under I.O.P. 5.7 does not constitute binding precedent.

McKEE, Circuit Judge.

Appellant Devon Sanders pled guilty to receipt of child pornography in violation of 18 U.S.C. § 2242(a)(2) and possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). Sanders presents three issues on appeal: (1) that his receipt and possession charges should have merged for sentencing; (2) that the district court erred when it found that probation was not available under 18 U.S.C. § 2252(a)(2), the receiving child pornography statute; and (3) that the district court abused its discretion by failing to disaggregate Sanders' harm from the harm caused by the original acts of child abuse when it ordered him to pay $91,049 in restitution.[1] For the following reasons, we will affirm the district court.[2]

[1] On Sanders' first claim, we review whether the two counts of his indictment merged for purposes of sentencing *de novo* as it presents a pure question of statutory construction and constitutional law. *United States v. Kennedy*, 682

F.3d 244, 255 n.8 (3d Cir. 2012). On Sanders' second claim, that probation is an available sentence under 18 U.S.C. § 2252(b)(1), we review this statutory interpretation issue *de novo*. *See, e.g.*, *Stiver v. Meko*, 130 F.3d 574 (3d Cir. 1997). On Sanders' final claim, we review the district court's restitution order for abuse of discretion. *United States v. Quillen*, 335 F.3d 219, 221 (3d Cir. 2003).

[2] The district court had jurisdiction under 18 U.S.C. § 3231 and we have jurisdiction over this appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742 to review the sentence and restitution order. *See, e.g.*, *United States v. Cooper*, 437 F.3d 324, 327 (3d Cir. 2006); *United States v. Stock*, 728 F.3d 287, 291 (3d Cir. 2013).

***744** The appellant correctly contends that the doctrine of merger is rooted in protections against the same conduct receiving multiple punishments, which the Double Jeopardy Clause prohibits.[3] In *United States v. Finley*, we reiterated the rule that for "multiple punishments to constitute a double jeopardy violation, the multiple charged offenses must be the same in law *and* in fact."[4] Whether the offenses are the same in law requires a court to consider if the statutory provision creates multiple offenses or one offense provable in alternative ways.[5] We expressly held in *United States v. Miller* that possession of child pornography is a lesser-included offense of receiving the pornographic material.[6] Conversely, whether two charged offenses are the same in fact requires the court to consider if the underlying conduct violates the statute more than once or only a single time.[7] Here, Sanders' receipt count was based on three images, and the possession count covered thousands of images found later for which the government could not charge receipt. Therefore, the district court correctly declined to merge the charges for sentencing.

[3] Sanders Br. at 2 (framing the issue as whether "the district court [should] have granted defendant Sanders's motion to merge Counts One and Two, because they charged the "same offense" under the Double Jeopardy Clause").

[4] 726 F.3d 483, 495 (3d Cir. 2013) (emphasis in original).

[5] *Id.* (citing *United States v. Rigas*, 605 F.3d 194, 207 (3d Cir. 2010) (en banc)).

[6] 527 F.3d 54, 71 (3d Cir. 2008) (citing *Ball v. United States*, 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)).

[7] *Finley*, 726 F.3d at 495 (citing *Rigas*, 605 F.3d at 212).

We need not reach the second issue of whether the district court erred when it found that probation was not an available sentence under 18 U.S.C. § 2252(a)(2) as the court clearly stated that it did not think that a probationary sentence was appropriate here. **App 201.**

Finally, Sanders claims that the district court did not appropriately disaggregate the harm that he caused to the victims from the harm caused by others in the distribution chain, such as the producers and distributors of the images. In *Paroline v. United States*, the Supreme Court laid out the considerations necessary to determine restitution awards in child pornography cases.[8] The court stated: "At a general level of abstraction, a court must assess as best it can from available evidence the significance of the individual defendant's conduct in light of the broader causal process that produced the victim's losses."[9] It noted that "[t]his cannot be a precise mathematical inquiry and involves the use of discretion and sound judgment."[10] It then listed "a variety of factors district courts *might* consider in determining a proper amount of restitution," noting that "it is neither necessary nor appropriate to prescribe a precise algorithm for determining the proper restitution amount at this point in the law's development."[11] It warned that "[t]hese factors need not be converted into a rigid formula.... They should ***745** rather serve as rough guideposts for determining an amount that fits the offense."[12]

[8] 572 U.S. 434, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014).

[9] *Id.* at 459, 134 S.Ct. 1710 (considering how courts should appropriately determine restitution awards under the statute).

[10] *Id.*

[11] *Id.* at 459–60, 134 S.Ct. 1710.

[12] *Id.* at 460, 134 S.Ct. 1710.

The district court explicitly considered all of the *Paroline* factors, including the factor of "whether the defendant had any connection to the initial production of the images." The Court of Appeals for the Eighth Circuit has noted that this factor accounts for disaggregation of the harm caused by the initial abuse from the harm of later possession.[13] To the extent *Paroline* can be read to require a district court make specific findings on disaggregation of the original harm from the harm caused by possession, the district court explicitly reduced the award based on that factor. **App**. **31**. Thus, the district court did not abuse its discretion in setting the award here.

[13] *United States v. Bordman*, 895 F.3d 1048, 1058 (8th Cir. 2018), *cert. denied*, — – U.S. ——, 139 S. Ct. 1618, 203 L.Ed.2d 902 (2019) (noting that *Paroline* accounted for disaggregation in the factor that asked "whether the defendant had any connection to the initial production of the images").

Accordingly, for the reasons stated above, we will affirm the judgment of sentence.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	**CRIMINAL ACTION**
	:	
vs.	**:**	
	:	
DEVON EDWARD SANDERS	**:**	**NO. 16-cr-0513**

M E M O R A N D U M

STENGEL, J. **August 27, 2018**

I. INTRODUCTION

On December 13, 2017, Defendant Devon Edward Sanders pleaded guilty to receipt of child pornography, 18 U.S.C. § 2252(a)(2), and possession of child pornography, § 2252(a)(4)(B). He was sentenced on June 4, 2018 to 84 months in prison and 10 years of supervised release. The government now seeks restitution, totaling $296,915, on behalf of twenty-two victims. For the reasons discussed below, I will award one-third of that amount, totaling $98,972.

II. PROCEDURAL AND FACTUAL BACKGROUND

Federal authorities became aware of Mr. Sanders's online activity when Homeland Security Investigations (HSI) began investigating individuals using "Bulletin Board A," an Internet location "dedicated to the advertisement, distribution and production of child pornography." (Doc. No. 54 at 1–2.) As described in the government's restitution motion, Mr. Sanders had been downloading sexually explicit images of children and babies. (Id. at 2.) On May

31, 2016, authorities executed a search warrant on Mr. Sanders's Glenside, Pennsylvania home and subsequently examined the content of his computer and four external hard drives. (Id.) The government summarizes the content as follows:

> Most of Sanders' collection depicted prepubescent girls, however there were also images involving infants, toddlers, and underage boys. The children in the images were sexually abused through forced vaginal, oral, and anal sex by adult males, by other children, and in some instances, by animals. Some images also depicted the children alone, in sexually explicit positions. The videos and images also include sadistic conduct and bondage. Of the videos, there are a total of 554 unique child pornography videos that are greater than 5 minutes in length, and 11 of those are longer than 1 hour. The longest running video is 3 days and 12 hours. All total, his very large collection filled four external hard drives, which accounts for approximately 2.5 Terabytes of data.

(Id. at 3–4.)

Mr. Sanders possessed over 94,000 unique images of child pornography.[1] (Id. at 1.) Twenty-two individual victims seek restitution totaling $296,915. (Id.) Exhibit A of the government's motion requesting restitution breaks down the restitution request by amount per victim. Exhibits B–M, organized by series, provide evidence of each victim's harm. Exhibit Q is a chart that lists the restitution awards that defendants in previous cases have been ordered to pay the victims.

[1] The defendant does not "stipulate that the government's count is correct as to the number of unique images" he possessed. (Doc. No. 59, at 2.) However, the accuracy of this number is not dispositive to my decision regarding restitution.

III. LEGAL STANDARD

Defendants convicted of receiving and possessing child pornography must pay restitution to their victims. See 18 U.S.C. § 2259(a), (b)(4). Under § 2259, restitution covers "the full amount of the victim's losses." § 2259(b)(1), (3). A court may not decline to order restitution because of the defendant's economic circumstances or "the fact that the victim has, or is entitled to, receive compensation" from another source. § 2259(b)(4)(B).

Child pornography victims are harmed not only by the original abuse, but also by the online permanent record, which is proliferated by those who distribute, receive, and possess the images. New York v. Ferber, 458 U.S. 747, 747 n.10 (1982). Because the victims' harm is caused by both an original abuser and an indeterminate number of possessors and distributors, it is a significant challenge to apportion restitution.

In 2014, the U.S. Supreme Court recognized this challenge, and Justice Kennedy authored a majority opinion that outlined a "broad-stroke standard" for calculating restitution. United States v. Darbasie, 164 F. Supp. 3d 400, 404 (E.D.N.Y. 2016) (citing Paroline v. United States, 134 S. Ct. 1710 (2014)). The Paroline framework, which I will discuss below in detail, instructs district courts regarding their great power and great responsibility to set the dollar value that an individual defendant owes individual victims.

Paroline held that mandatory restitution under § 2259 is proper "to the extent the defendant's offense proximately caused a victim's losses." 134 S. Ct. at

1722.The Court explained its rationale, and the causal link that must be established, as follows:

> In this special context, where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, a court applying § 2259 should order restitution in an amount that comports with the *defendant's relative role in the causal process* that underlies the victim's general losses. The amount *would not be severe* in a case like this, given the nature of the causal connection between the conduct of a possessor like Paroline and the entirety of the victim's general losses from the trade in her images, which are the product of the acts of thousands of offenders. *It would not, however, be a token or nominal amount.* The required restitution would be a *reasonable and circumscribed* award imposed in recognition of the indisputable role of the offender in the causal process underlying the victim's losses and suited to the relative size of that causal role.

Id. at 1727 (emphasis added).

Paroline outlined discretionary considerations and factors that a district court should assess to determine a defendant's "relative role in the causal process."

> [D]istrict courts might, as a starting point, determine the amount of the victim's losses caused by the continuing traffic in the victim's images . . . , then set an award of restitution in consideration of factors that bear on the *relative causal significance of the defendant's conduct* in producing those losses. These could include **[1]** the number of past criminal defendants found to have contributed to the victim's general losses;[2] **[2]** reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; **[3]** any available and reasonably reliable estimate of the broader number of

[2] Paroline states that "general losses" are losses that stem from the "ongoing traffic" in the victim's images. Id. at 1722. As I will discuss below, such losses should be disaggregated from the "losses sustained as a result of the initial physical abuse." Id.

> offenders involved (most of whom will, of course, never be caught or convicted); **[4]** whether the defendant reproduced or distributed images of the victim; **[5]** whether the defendant had any connection to the initial production of the images; **[6]** how many images of the victim the defendant possessed; and **[7]** other facts relevant to the defendant's relative causal role.
>
> These factors need not be converted into a rigid formula, especially if doing so would result in trivial restitution orders. They should rather serve as *rough guideposts* for determining an amount that fits the offense. The resulting amount fixed by the court would be deemed the amount of the victim's general losses that were the "proximate result of the offense" for purposes of § 2259, and thus the "full amount" of such losses that should be awarded. The court could then set an appropriate payment schedule in consideration of the defendant's financial means. See § 3664(f)(2).

Id. at 1728 (citation omitted) (emphasis and numbering added).

IV. DISCUSSION

Mr. Sanders claims that the government has not met its burden of proving by a preponderance of evidence that his relative role in causing the victims' losses comports with its requested restitution awards. Mr. Sanders does not dispute that the individuals requesting restitution in his case are "victims" under § 2259 or that he possessed their images, and he does not dispute that they suffered the losses described and quantified in Exhibits B–M.

The defendant bases his objection to the government's restitution request on two distinct issues:[3] (1) the government failed to differentiate between the harm

[3] The defendant makes an additional argument in its supplemental response to the government's motion for restitution. (Doc. No. 59.) He argues that he did not proximately cause any damages that predate his criminal conduct. (Id. at 1.)

Based on a 2015 Third Circuit decision, I disagree with the defendant on this point. The Third Circuit held that a defendant's conduct was a "substantial factor" in a

caused by the original act of child abuse and the harm caused by subsequent defendants, and (2) the government failed to quantify Mr. Sanders's responsibility relative to other defendants. (Doc. No. 57, at 3–4.)

A. Defendant's Responsibility Relative to Original Abuser

Last month, the Eighth Circuit addressed the defendant's first argument, that the government failed to disaggregate the initial abuse from the subsequent use of the victims' images. See United States v. Bordman, 895 F.3d 1048, 1058 (8th Cir. 2018). The court noted that Paroline merely acknowledged the potential difficulty of this issue but did not address it further. Id. (quoting Paroline, 134 S. Ct. at 1722 ("Complications may arise in disaggregating losses sustained as a result of the initial physical abuse.")). Importantly, the court noted, the Paroline factors explicitly account for disaggregation. Id. at 1059 (quoting Paroline 134 S. Ct. at 1728 (including as a factor "whether the defendant had any connection to the initial production of the images")). These factors should be treated as "rough

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victim's harm even though the victim began therapy *before* learning of the defendant's role in the abuse. United States v. Jacobs, 609 Fed. App'x 83, 87 (3d Cir. 2015).

In Jacobs, the defendant pretended to be a teenage girl, and he manipulated and blackmailed boys into sending him explicit pictures of themselves. Id. at 84. This case differs from Mr. Sanders's because the defendant's conduct (though not the victims' knowledge of that conduct) predated the victims' psychological treatment. Whereas, Mr. Sanders seems to argue that his conduct did not predate *all* of the victims' harm (mostly meaning psychological treatment).

I find that the reasoning of Jacobs nonetheless fits here. Here, the victims' harm is the knowledge that their image is being shared far and wide. In other words, the harm does not hinge on any particular defendant's action. Every defendant who handled the victims' images, at any time, is responsible for a relative portion of the harm. Additionally, there is no reason to believe that the timing of the defendant's conduct in this case would create a material difference in the amount of therapy necessary for a victim.

guideposts" rather than "a rigid formula." Id. (quoting Paroline 134 S. Ct. at 1728). Considering all of this, the Eighth Circuit upheld the district court's restitution award of $3,000. Id.

The Eighth Circuit in Bordman implied that disaggregation from the original abuse is a "rough guidepost," like the other Paroline factors. On the other hand, the Ninth Circuit held that a district court erred when it did not disaggregate the victim's losses. United States v. Galan, 804 F.3d 1287, 1291 (9th Cir. 2015).

The Tenth Circuit, in United States v. Dunn, similarly reversed and remanded a district court judgment, finding that, "to the extent that the district court relied on an expert report that did not disaggregate these harms, the district court's adoption of $1.3 million as the total measure of damages cannot stand." 777 F.3d 1171, 1182 (10th Cir. 2015). Dunn reasoned that the defendant, who was convicted of possession, receipt, and distribution of child pornography, could not have proximately caused the losses attributable to the original abuse. Id. at 1181–82. Dunn essentially held that Paroline's proximate cause requirement could not be met where a court did not disaggregate the harm of the original abuse from the harm inflicted by subsequent defendants.

Here, I find that harm by subsequent defendants must be considered separately from harm inflicted by the original abuser. A failure to account for this division of responsibility would mean holding Mr. Sanders responsible for more than his share of the victims' losses. I will address this in more detail below, in the relevant section of the Paroline analysis.

B. Defendant's Responsibility Relative to Other Defendants

The defendant's second argument is that the government failed to establish Mr. Sanders's portion of responsibility relative to other defendants. Again, Paroline provides the framework for district courts to assess this issue. I must determine the amount of loss that Mr. Sanders proximately caused (as demonstrated by a preponderance of the evidence). Below, I will analyze each of the Paroline factors, addressing the defendants' two arguments in the course of my analysis.

C. Paroline Analysis

To demonstrate the victims' losses in support of its restitution request, the government submitted twelve packets, one for each series, each prepared by private counsel for the victims. (Exs. B–M.) These packets contain a psychological evaluation and victim impact statement for each of the twenty-two victims, along with other supporting documentation. The packages are far from uniform—some contain a vocational evaluation, some do not; some provide a bottom-line total of the victim's general losses, some do not. Even where comparable information is provided, its presentation is not uniform. Perhaps most notably, none of the packets explain the methodology by which they calculate Mr. Sanders's portion of the harm; nowhere is that explained.

Therefore, I am left with documents that detail the victims' suffering, the long-term treatment they will require, and other relevant facts and figures (none of

which are disputed), but with very little guidance regarding this defendant's relative causal role.

In an Eastern District of New York case, where the government had requested an across-the-board $3,000 per victim, the court noted that the dollar amount seemed similarly untethered from discernible reason. See Darbasie, 164 F. Supp. 3d at 405.

> [O]ther than the existence of similar awards computed in similar instances, nothing in the government's filings gives a plausible explanation as to how it arrived at its blanket suggestion to award restitution to each identified victim in the amount of $3000. If that amount bears any connection to the restitution grounds for any of the identified victims, it is a well-guarded secret.

Darbasie, 164 F. Supp. 3d at 405.

Darbasie assessed the restitution request for each victim. For the first victim, it reasoned that the total loss claim was $2.75 million, with a "known offender equal share of $81,000." Id. at 407. With that, it found that $3,000 represented a very conservative number that would avoid over-punishment of the defendant, that the government considered fair, and that aligned with Paroline. Id.

For a second victim with significantly lower documented losses and no data regarding past or future offenders, the court found, with little discussion, that $3,000 was also an appropriate restitution award. Id.

The third victim had claimed $1.1 million in overall losses and had received $600,000 from hundreds of previous restitution awards. Id. at 408. For this victim, the court followed a previous case, which had awarded her only

$2,000, out of caution that "restitution orders would outpace the claimed loss and, perhaps, force courts to 'become unseemly paymasters smoothing out restitution contributions among pornographers' who had victimized her." Id. (citing United States v. DiLeo, 58 F. Supp. 3d 239, 244 (E.D.N.Y. 2014)).

For other victims who the government identified but who had not individually claimed restitution, the court awarded them each $3,000.[4] Id. The court reasoned that even though "the absence of permissible proof" prevented "a *Paroline* analysis even in a superficial way," the defendant had not opposed the $3,000 sought for these victims, and Paroline mandated a "sum more than 'trivial.'" Id.

Below, I will analyze the Paroline factors to the extent possible in order to determine an appropriate restitution award, one that reflects the harm Mr. Sanders proximately caused, as proven by a preponderance of the evidence. Briefly, after my analysis, I will outline the additional information that would be helpful to me, and presumably to other district court judges, in handling child pornography restitution cases.

A. "[T]he number of past criminal defendants found to have contributed to the victim's general losses"

[4] The court excluded one victim, "Tara," who had already received the full amount of her restitution request and "expressed her desire that no further restitution . . . be paid to her." Id. at 406, 408.

In this case, there are twenty-two victims in twelve separate series seeking restitution. (Ex. A.) In the documentation provided by the government, it is difficult to decipher how many defendants have been ordered to pay restitution to each victim. The government's Exhibit A lists the "ordered" and "recovered" restitution victim by victim, but it is unclear what "ordered" means in this context and whether "recovered" is a current figure. Exhibit Q lists every restitution award for each victim, but again, it does not provide a date for when it is current through, and this 70-page document neither enumerates the restitution awards per victim nor provides the total payments received by each victim.[5]

The figures in Exhibit A appear to be incomplete. In Exhibit A, the 2Crazygurls Series and the Vicky Series both show that more restitution has been "recovered" than "ordered." Regarding the Lighthouse Series, the Spongebob Series, and the Sweet Sugar Series, Exhibit A is missing either or both of the "recovered" and "ordered" amounts.

Given the evidence presented and the organization thereof, I cannot readily assess the restitution each victim is seeking from this defendant and the total amount each has recovered from other defendants. I am left to depend on the government's own representation, which the defendant has not refuted, that none

[5] Additionally, it does not group the restitution awards by crime to allow for comparison (for instance, a comparison of awards in all "possession" cases regarding a given victim). It organizes some series alphabetically by jurisdiction, others alphabetically by defendant name, and others seemingly not at all.

of the victims yet have been "made financially whole." (Gov.'s Suppl. To Mot. for Restitution, at 3.)

Separate and apart from all of these issues, as a general matter, I would hesitate to depend significantly on the number of previous defendants who have been ordered to pay restitution because that figure could easily be skewed by factors such as how long ago a victim began seeking restitution. For instance, imagine one victim who sought awards early-on and currently has hundreds, while another started seeking awards later and only has a handful (but years from now may have a similar amount to the first victim).[6]

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[6] In Bordman, the Eighth Circuit case, the restitution issue involved "Pia," who is also a victim here, as one of the three victims in the Sweet Sugar series. Bordman, 895 F.3d at 1052. The court described the documentation that had been submitted to the district court, and upon which the court based its $3,000 restitution award:

> The documentation included a victim impact statement by Pia's mother, a report from psychologist Dr. Marsha Hedrick, and an attorney costs declaration. Dr. Hedrick estimated that the costs to Pia, including therapy, related expenses, and a vocational assessment and counseling, would be $91,900. Pia's attorney estimated that her costs incurred (excluding attorney's fees) were $10,187.13. . . . In its supplemental sentencing memorandum, the government added one-third of the attorney's costs (because the attorney represented three victims in the "Sweet Sugar" series) to Dr. Hedrick's estimate, resulting in a total of $95,295.71.

Id.

That documentation appears to be the same documentation submitted by "Pia" in this case. In Bordman, the $3,000 figure was based largely on the fact that 31other defendants had been ordered to pay restitution to the victim. Id. Dividing the $95,295.71in general losses by 32 (31, plus Bordman), resulted in $2,977.99. Id. The district court found, and the Eighth Circuit affirmed, that other factors, in addition to this "1/n formula" that considers previous restitution orders, made $3,000 a reasonable sum. Id. at 1058–59.

Comparing Bordman to Mr. Sanders's case illustrates the problem with depending too heavily on the Paroline factor that considers past defendants who have contributed to the victims' losses. While there were 31 other restitution orders when the district court decided Mr. Bordman's case, that number has now approximately doubled. See Ex. Q.

Lastly, inherently absent from Exhibit Q are individuals who have been convicted (and therefore contributed to the harm) but who, for one reason or another, were not ordered to pay restitution. For all of these reasons, I will not depend heavily on the "number of past criminal defendants found to have contributed to the victim's general losses" because any available measure of that number is unreliable.

B. "[R]easonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses"

The government has not attempted to quantify the likely number of future offenders, and it would be impossible to do so except to say that it is likely significant, given the unfortunate regularity of such convictions. Therefore, this factor does not weigh heavily on my restitution decision.

C. "[A]ny available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted)"

For similar reasons to those discussed above, this factor is impossible to estimate.

Yet, given Pia's losses and the conduct at issue, I see no reason why Mr. Sanders's would be any less responsible than Mr. Bordman. The fact that Mr. Sanders's restitution payment is calculated at a later date should have no bearing on his proportional responsibility.

D. "[W]hether the defendant reproduced or distributed images of the victim"

Mr. Sanders was not convicted of reproducing or distributing the images. Therefore, this factor weighs in favor of a lower restitution award than in cases where the defendant was more deeply involved in the exchange of images.

E. "[W]hether the defendant had any connection to the initial production of the images"

Mr. Sanders was not connected to the initial production of the images. Therefore, this factor leans in favor of a lower restitution amount than if he were involved in the initial production.

As discussed above, whether it is mandatory or not to disaggregate the original abuser's harm from that of subsequent defendants, I find that disaggregation must be considered here in order to achieve a fair result. The proportions of harm due to the initial abuse and the subsequent use of the images will necessarily vary victim-to-victim.

The Ninth Circuit noted that many factors contribute to these variations, including the "egregiousness of the original abuse; how a victim can (or does) cope with that kind of abuse when distribution of images does not follow; and the particular victim's own reactions to the various traumas to which the victim has been subjected." United States v. Galan, 804 F.3d 1287, 1291 (9th Cir. 2015). However, weighing these factors is a necessarily imprecise and discretionary process. "If the ultimate apportionment is not scientifically precise, we can only

say that precision is neither expected nor required." Id. (citing Paroline, 134 S. Ct. at 1728–29).

Because the victims' requested restitution is a small fraction of their total losses, it is a reasonable presumption that the government considered disaggregation in fashioning its request. However, because disaggregation is a significant factor, and because it is unclear to what extent it factored into the restitution request, I will award less than the requested amount of restitution in large part to account for this factor.

F. "[H]ow many images of the victim the defendant possessed"

Mr. Sanders possessed approximately 94,000 unique images of child pornography. (Doc. No. 54, at 3.) Of those images, 1,614 correspond to the twenty-two victims seeking restitution.[7] These numbers show that the defendant was significantly involved in the procurement and collection of child pornography, and the victims' restitution awards should reflect this.

In Exhibit A, the government breaks down the number of images possessed by Mr. Sanders by series, but not by victim—and four of the twelve series have multiple victims. Therefore, it is impossible to decipher how many photos of each victim Mr. Sanders possessed.

The numbers of images by series range from one, in the J_blonde Series, to 899 in the 8 Kids Series. (Ex. A.) No evidence has been presented regarding

[7] This number was calculated by adding the number of images listed under each of the twelve series in the government's Exhibit A.

whether Mr. Sanders's possession of 899 images caused a materially greater harm than Mr. Sanders possession of one image to the victims of the respective series.

As noted in multiple victim impact statements, the widespread and seemingly endless exchange of the images is the source of anguish. Whether a defendant holds one or a thousand of a victim's images, he has taken part in causing this mental anguish and terror.

Given the evidence before me, I cannot say that Mr. Sanders's possession of more images of one series means he should pay a discernibly higher amount to those victims than to others. Therefore, in light of this lack of evidence, I will not differentiate among victims of different series based on the number of images possessed.

G. "[O]ther facts relevant to the defendant's relative causal role"

There is nothing additional about Mr. Sanders's case that would make him deserving of a more or less favorable outcome than similarly situated defendants.

H. Restitution Attributable to Mr. Sanders

I must contemplate a restitution award that compensates the victims for their harm but does not punish Mr. Sanders for more than the share he proximately caused. This is an inherently difficult challenge.

The government's restitution request, comprised of 22 separate requests for each victim, totals $296,915.[8] (Ex. A.) The victims' individual requests all

[8] Two victims' restitution requests require additional analysis because they each include both a general request (like the others) and a separate request—one for attorney's

represent a small fraction of their total losses, comprised largely of long-term psychological treatment. The total losses are supported by psychological evaluations, victim impact statements, and other supporting documents, which detail each victim's harm. (Exs. B–M.)

As noted above, the analysis underlying each victim's requested restitution, which purportedly accounts for Mr. Sanders's individual role, is entirely unclear

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fees and the other for expenses. The mandatory restitution statute includes recovery for a victim's attorney's fees and other expenses. 18 U.S.C. § 2259(b)(3). These expenses, like the victims' other losses, must be proven by a preponderance of the evidence and apportioned according to the "relative causal significance" of the defendant's conduct, pursuant to Paroline. See 134 S. Ct. at 1728.

First, for the J_blonde series, the government has requested $1,500 in attorney's fees in addition to the general restitution request of $7,500. (Ex. A.) A letter from the victim's attorney, Carol L. Hepburn, states that the $1,500 figure is based on her hourly rate of $350. (Ex. F.) No further information has been provided that would allow me to understand why this figure has been listed separately from the victim's general losses or to assess whether this figure has been apportioned to match this defendant's relative causal role. Therefore, I cannot find by a preponderance of the evidence that this requested sum aligns with the defendant's role.

That said, there is no doubt that the victim's attorney put a significant amount of work into this matter. Accordingly, I need to calculate an appropriate award. As reflected in the order that accompanies this memorandum, I will reduce the request for attorney's fees by three-quarters, resulting in a conservative award that takes into account the Paroline factors, including the fact that much of the same legal work may be used in seeking restitution from other defendants.

Second, for the Spongebob series, the government has requested $33,415 in expenses ($29,000 for a forensic psychological exam and $4,415 for a report on economic losses) in addition to the general restitution request of $25,000. (Ex. A.) This request for expenses is *very* high and has not been calculated to coordinate with Mr. Sanders's relative role. Throughout this case, I have avoided delving into the calculus behind each victim's reported expenses because they are supported by Exhibits B–M and because the defendant did not dispute them. However, this particular expense is an outlier that I must address separately in order to fairly apply the law. I must consider the Paroline factors discussed above, keeping in mind that the same items accounted for in the expenses may be used in seeking restitution from other defendants, and calculating a conservative award in light of the lack of supporting evidence. With that, I will reduce this award to ten percent of the amount requested by the government. This will be reflected in the order accompanying this memorandum.

from the record. Based on the evidence before me, I cannot agree that Mr. Sanders is responsible for the entire amount requested. However, the government has proven by a preponderance of evidence that Mr. Sanders proximately caused some portion of the victims' harm. Therefore, I must calculate an appropriate award.

In order to assess Mr. Sanders's portion of the victims' harm, I will consider the evidence before me in light of the Paroline factors discussed above, and I will reduce the sum further to account for the opacity of the reasoning behind the requested amounts. I will grant a restitution award that is one-third of the government's requested total. In doing so, I am attempting to carry out my role as summarized in Paroline:

> [C]ourts can only do their best to apply the statute as written in a workable manner, faithful to the competing principles at stake: that victims should be compensated and that defendants should be held to account for the impact of their conduct on those victims, but also that defendants should be made liable for the consequences and gravity of their own conduct, not the conduct of others.

Paroline, 134 S. Ct. at 1729.

My decision to award one-third of the government's requested sum maintains the relative differences in the victims' circumstances, as set forth in Exhibits B–M. Frankly, I would like to award more than this if the evidence supported it. Victims of child pornography crimes must deal with the fact that their abuse is proliferated and watched by countless individuals over many years. While we have victim impact statements and psychological evaluations to drive home this harm, the truth is that no amount of compensation could ever fix it. I also

regret that the judicial process for determining restitution awards in child pornography cases is so imperfect and imprecise. This is neither good for victims nor defendants. In an attempt to improve upon this process, I have listed items below that would help district courts assess restitution requests more efficiently and uniformly.

I. Improving the Paroline Process

The Paroline framework, with its broad, discretionary factors, is difficult to employ efficiently (especially in cases involving many victims) and uniformly across many cases. However, as I have endeavored to work toward fair disposition here, I have realized that simple improvements in the presentation of the victims' losses would go a long way in helping district court judges determine fair restitution awards. What follows is a wish list, of sorts, that may be useful in future cases. It aims to achieve a higher level of uniformity and efficiency in the presentation of information. Any progress made toward that end would help district courts immensely.

1. Principal and Supplemental Charts

The chart labeled Exhibit A in this case is useful but could be improved upon in several ways. Exhibit A was the go-to document for concrete facts and figures. It had four categories: "Series and # Images," "Victim," "Amount," and "Payable." "Amount" listed the per-victim restitution request, and "Payable" provided the address for payment and the "ordered/recovered" restitution amounts.

The information contained in Exhibit A could be improved upon in the following ways: (1) by listing the number of photographs by victim, instead of only by series, (2) by clarifying what "ordered/recovered" means and the date through which those figures are current, and (3) by separating the requests for attorney's fees and other expenses from the sum of each victim's total losses and detailing the basis for those requests (or, instead, by consistently including all expenses in the per-victim restitution request).

Either the same chart or a separate chart should list each victim's *total* losses (ideally, broken down by category, such as "future mental health treatment"), total attorney's fees, other expenses, and requested restitution award. As noted below, the government, in its briefing, should explain the process by which it arrived at the requested restitution award.

Another chart, similar to the government's Exhibit Q in this case, should list the individual restitution awards previously ordered for each victim *and* the total restitution ordered for each victim. This chart should be numbered so that the court can readily see how many restitution orders there are per victim. Critically, this chart should note the date through which these figures are current.

2. Paroline Analysis

Both parties should brief the Paroline factors as they relate to *each victim* (or by categorizing similarly situated victims) so that the court can consider opposing arguments. In the course of this analysis, the government should detail

the reasoning that underlies the requested amount of restitution for each victim (and how each requested sum relates to each victim's total losses).

3. Organization of Victims' Documentation

The government should provide an index listing every victim's documentation, including the exhibit numbers (if applicable) and the documents included therein.

While I hope this brief list serves as a jumping-off point to improve the post-Paroline process, I agree with the Ninth Circuit that the task of determining restitution in child pornography cases "cries out for a congressional solution." See Galan, 804 F.3d at 1291.Until then, we must do our best to work within and improve the system we have in place.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	**CRIMINAL ACTION**
	:	
vs.	**:**	**NO. 16-0513**
	:	
DEVON EDWARD SANDERS	**:**	

O R D E R

AND NOW, this 27th day of August, 2018, upon consideration of the government's motion requesting restitution (Doc. No. 54); the defendant's response and supplemental response (Doc. Nos. 57, 59); and the government's supplement to its motion for restitution, and after a July 31, 2018 hearing on the matter, **IT IS HEREBY ORDERED** that the government's motion is **GRANTED IN PART**.

Mr. Sanders must pay restitution to the twenty-two victims who have requested it in the amounts listed in the chart below.

	Series	**Victim**	**Amount**	**Payment**
1	8 Kids	John Does I–V (5 victims)	$5,000 per victim (5)	Tanya Hankins Law Office of Erik L. Bauer in trust for [child] 215 Tacoma Avenue South Tacoma, WA 98402
2	Angela	Angela	$4,000	Attorney Elaine Lenahan in trust for Angela 2655 Villa Creek, Suite 222 Dallas, TX 75234
3	At School	Violet	$3,333	Attorney Carol Hepburn in trust for Violet 200 1st Avenue W., Suite 550 Seattle, WA 98119-4203

4	2Crazygurls	Chelsea	$3,333	Attorney Elaine Lenahan in trust for Chelsea 2655 Villa Creek, Suite 222 Dallas, TX 75234
5	J_blonde	Solomon	$2,875[1]	Attorney Carol Hepburn in trust for Solomon 200 1st Avenue W., Suite 550 Seattle, WA 98119-4203
6	Jan_Socks	Sierra, Savannah, Skylar, Sally (4 victims)	$3,333, $2,500, $2,500, $2,500	Attorney Carol Hepburn in trust for [child] 200 1st Avenue W., Suite 550 Seattle, WA 98119-4203
7	Lighthouse	Maureen, Casseaopeia	$3,333, $8,333	Attorney Deborah A. Bianco in trust for Maureen 14535 Bellevue-Redmond Rd., Suite 201 Bellevue, Washington 98007 Marsh Law Firm in trust for Casseaopeia Box 4668 #65135 New York, NY 10163-4668
8	Marineland	Sarah	$5,000	Attorney Carol Hepburn in trust for Sarah 200 1st Avenue W., Suite 550 Seattle, WA 98119-4203
9	Spongebob	Andy	$11,675[2]	Heidi Nestel, Esquire in trust for Andy 3335 South 900 East, Suite 200 Salt Lake City, UT 84106
10	Sweet Sugar	Ava, Mya, Pia	$1,667 $1,667 $1,667	Attorney Deborah A. Bianco in trust for [child] 14535 Bellevue-Redmond Rd., Suite 201 Bellevue, Washington 98007

[1] This sum includes a $2,500 award for the victim's losses, plus a $375 award for the victim's attorney's fees. The award for attorney's fees is one-fourth of the amount requested by the government, as discussed in footnote eight of the memorandum accompanying this order.

[2] This sum includes an $8,333 award for the victim's losses, plus a $3,342 award for the victim's expenses. The award for expenses is one-tenth of the amount requested by the government, as discussed in footnote eight of the memorandum accompanying this order.

11	Tightsngold	Emily	$5,000	Tanya Hankins Law Office of Erik L. Bauer in trust for Emily 215 Tacoma Avenue South Tacoma, WA 98402
12	Vicky	Vicky	$3,333	Attorney Carol Hepburn in trust for Vicky 200 1st Avenue W., Suite 550 Seattle, WA 98119-4203
			Total: $91,049	

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

Nos. 18-2719 and 18-2994

_____

UNITED STATES OF AMERICA

v.

DEVON E. SANDERS,
Appellant

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 2:16-cr-00513).

_____

SUR PETITION FOR REHEARING

_____

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and ROTH[1] Circuit Judges

The petition for rehearing filed by **appellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

[1] Judge Roth's vote is limited to panel rehearing only.

concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Theodore A. McKee
Circuit Judge

Date: December 11, 2020
cc: Alison D. Kehner, Esq.
Michelle Rotella, Esq.
Peter Goldberger, Esq.